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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 513TH MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 16 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

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The meeting was called to order at 2.15 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

Consideration of draft Guide to Enactment (continued) (A/CN.9/375)

1. Mr. GRUSSMANN (Austria) said it was his understanding that the Commission had adopted the Guide to Enactment of the Model Law. If the proposal made by the representative of the United States of America at the previous meeting for a written comment procedure leading to a redrafting of the Guide to Enactment were accepted, the resulting text would be a Secretariat rather than a Commission document.

2. Mr. KOUVSHINOV (Russian Federation) supported the views expressed by the representative of Austria. The Guide had been adopted and any further discussion would be of an adopted document. For his country the matter was of considerable practical importance since it was in the process of framing and adopting legislation on tendering. The work of the Commission was highly appreciated by his Ministry of External Economic Affairs; it was of great practical assistance to countries in economic transition.

3. Mr. PRIESTLEY (Observer for Australia) said he shared the views expressed by the representatives of Austria and the Russian Federation, and by the representative of Canada at the previous meeting. The procedure had already been agreed upon. He would not be in favour of the Commission reconsidering its decision to adopt the Guide. Firstly, the procedure proposed by the representative of the United States would cause an indefinite delay in the adoption of the Guide and, secondly, the members of the Commission had been assuming that the procedure would be as outlined by the Chairman. The decision should not be changed at such a late stage.

4. The CHAIRMAN concluded that the Commission did not wish to change its earlier decision. The Guide to Enactment had been adopted and would remain so. Certain additions could be made to clarify points as long as they fell within the parameters of the Commission's decision. When issued in its final form, the Guide to Enactment would be a Commission document.

5. Mr. PHUA (Singapore) asked when the final text of the Guide would be ready.

6. Mr. SAHAYDACHNY (Secretariat) said that the revision of the Guide to reflect decisions taken by the Commission at the present session, including suggested changes and the alignment of the Guide with the final text of the Model Law, could not realistically be expected to be completed earlier than about October. It would be difficult to give a more precise date.

7. Mr. PHUA (Singapore) sought an assurance that the Guide would be precisely as had been decided so that he could report the decision to his Government.

8. The CHAIRMAN said that the Secretariat would make no changes to what had been adopted. He took it that the Commission wished to reconfirm its adoption of the draft Guide to Enactment subject to the agreed changes.

9. It was so decided.

Consideration of draft Model Law on Procurement (continued)

Report of the drafting group (continued) (A/CN.9/XXVI/CRP.4/Add.1-4)

Document A/CN.9/XXVI/CRP.4/Add.1

10. The CHAIRMAN invited the Commission to consider the changes to the draft Model Law proposed by the drafting group.

Article 11, paragraph (1) chapeau

11. The text proposed by the drafting group was adopted.

Article 11 (1) (b)

12. The text proposed by the drafting group was adopted.

Article 11 (1) (e)

13. The text proposed by the drafting group was adopted.

Article 11 (1) (k)

14. The changes proposed by the drafting group were adopted.

Article 11 (1) (l)

15. The text proposed by the drafting group was adopted.

Article 11 (2)

16. Ms. ZIMMERMAN (Canada) asked why the provision was subject to article 28 (3).

17. Mr. SAHAYDACHNY (Secretariat) said that the provisions in paragraphs (2) and (3) of article 11 concerning the disclosure of certain portions of the record only after the acceptance of a tender were, as they stood, inconsistent with article 28 (3), which provided that the tender price would be announced at the opening of tenders. The Commission's decision to require a broader notification not limited to the suppliers or contractors engaged in the procurement proceedings had made the cross-references necessary.

18. Mr. AL-NASSER (Saudi Arabia) said that the phrase "be made available to any person after a tender ... has been accepted" was not clear, at least in the Arabic version. He wondered whether the text could be amended to read: "... after acceptance of its tender ... ".

19. Mr. JAMES (United Kingdom) said that the text as drafted was correct, at least in the English version. The paragraph was intended to provide that the portion of the record concerned should be available to the public in general and not merely to suppliers and contractors. To say "its tender" would change the meaning.

20. The CHAIRMAN said that the Arabic text would be amended if necessary and that all language versions would be checked subsequently to ensure their alignment.

21. The new text of article 11 (2) proposed by the drafting group was adopted.

Article 11 (3), chapeau

22. The text proposed by the drafting group was adopted.

Article 11 (3) (b)

23. The text proposed by the drafting group was adopted.

Article 11 (4)

24. Ms. ZIMMERMAN (Canada) suggested that the words "the present article" in the last line be replaced by the words "this article".

25. Mr. HERRMANN (Secretary of the Commission) said that the United Nations generally preferred to say "the present article" in such a case rather than "this article" as the latter might be misleading if, as often happened, the same provision contained a reference to some other article.

26. The new text of article 11 (4) proposed by the drafting group was adopted.

Article 12

27. The text proposed by the drafting group was adopted.

Article 13 (2)

28. The changes proposed by the drafting group were adopted.

Article 14 (1), chapeau

29. The change proposed by the drafting group was adopted.

Article 14 (1) (a)

30. The change proposed by the drafting group was adopted.

Article 14 (1) (c)

31. The change proposed by the drafting group was adopted.

Article 14 (1) (d)

32. The change proposed by the drafting group was adopted.

Article 14 (2), chapeau

33. The text proposed by the drafting group was adopted.

Article 14 (2) (a)

34. The text proposed by the drafting group was adopted.

Article 14 (2) (b)

35. The text proposed by the drafting group was adopted.

Article 15 (1)

36. The change proposed by the drafting group was adopted.

Article 15 (2)

37. The change proposed by the drafting group was adopted.

Article 16, chapeau

38. The changes proposed by the drafting group were adopted.

Article 16 (b)

39. The text proposed by the drafting group was adopted.

Article 16 (c)

40. The text proposed by the drafting group was adopted.

Article 16 (e)

41. The change proposed by the drafting group was adopted.

Article 16 (f)

42. The change proposed by the drafting group was adopted.

Article 16 (g)

43. The change proposed by the drafting group was adopted.

Article 17 (b)

44. Ms. ZIMMERMAN (Canada) said that the words "small quantity and low value" implied that a large procurement of low value would not fall within the scope

(Ms. Zimmerman, Canada)

of article 17 and thus rule out domestic tendering for large quantities of goods of low value. It would be preferable to delete the reference to quantities and refer only to "low value".

45. Mr. JAMES (United Kingdom) said that the wording offered by the drafting group had been intended to cover articles of very high unit value but few in number. On reflection, he agreed with the representative of Canada that the reference to "small quantity" should be deleted.

46. The CHAIRMAN said he took it that there was agreement that the words "low amount or value" in the original text of article 17 (b) submitted by the Working Group would be changed to "low value", rather than to "small quantity and low value" as proposed by the drafting group.

47. It was so decided.

Article 17, last paragraph

48. The change proposed by the drafting group was adopted.

Article 19 (1), chapeau

49. The change proposed by the drafting group was adopted.

Article 19 (1) (b)

50. The text proposed by the drafting group was adopted.

Article 19 (1) (d)

51. The change proposed by the drafting group was adopted.

Article 19 (2)

52. The text proposed by the drafting group was adopted.

Article 21 (g)

53. Ms. ZIMMERMAN (Canada) asked for confirmation that the amendment concerned, proposed by the Secretariat, had been accepted by the Commission.

54. Mr. WALLACE (United States of America) said that he was under the impression that the amendment had not been adopted.

55. Mr. HERRMANN (Secretary of the Commission) replied that according to his notes a number of speakers had supported the Secretariat's text.

56. The CHAIRMAN said he thought there had been no strong objection to the text.

57. The change proposed by the drafting group was adopted.

Article 21 (1)

58. The insertion proposed by the drafting group was adopted.

Article 21 (n)

59. The change proposed by the drafting group was adopted.

Article 22, heading

60. The proposed changes were adopted.

Article 22 (1)

61. The proposed changes were adopted.

Article 22 (2)

62. The proposed change was adopted.

Article 22 (3) (a)

63. Ms. ZIMMERMAN (Canada) said that the amendments made to article 22 reflected the decision of the Commission to move that article to chapter I of the Model Law and to reword the paragraphs so that they would apply both to tendering and to other methods of procurement. Consistent with that change, the phrase "in formulating the specifications" in the third line of article 22 (3) (a) as it appeared in document A/CN.9/371 should read "in formulating any specifications".

64. It was so agreed.

65. The change to article 22 (3) (a) proposed by the drafting group was adopted.

Article 22 (3) (b)

66. The text proposed by the drafting group was adopted.

New article 12 ter (former article 22 (4))

67. Mr. LEVY (Canada) said that, as drafted, the article appeared to require countries like Canada, both of whose official languages were customarily used in international trade, to provide documents in a third language. He suggested that an additional phrase might be inserted in brackets after the words "used in international trade" to make the sense clear.

68. Mr. JAMES (United Kingdom) said that the intention had been to leave the words "and in a language customarily used in international trade" in brackets, as in the original draft in document A/CN.9/371.

69. Mr. SAHAYDACHNY (Secretariat) said that the brackets would have to close at the end of subparagraph (b) for the sense to be as intended.

70. Ms. CLIFT (Observer for Australia) suggested that, in subparagraph (b), the words "small quantity and" be deleted.

71. It was so agreed.

72. With those changes, the text proposed by the drafting group was adopted.

Document A/CN.9/XXVI/CRP.4/Add.2

Article 6 (1) and (2)

73. Mr. WALLACE (United States of America) wondered whether the new mandatory language of subparagraph (1) (b) was compatible with the provision in article 34 (9) (d).

74. Mr. JAMES (United Kingdom) said that making qualification mandatory for all procurement procedures meant that a test of unreliability or incompetence was no longer needed in article 34, and that consequently article 34 (9) (d) could be deleted.

75. Mr. PRIESTLEY (Observer for Australia) endorsed that suggestion.

76. Mr. LEVY (Canada) said that, while article 34 (9) (d) might be redundant for lawyers and other experts, it did not conflict in any way with article 6 (1) (b). Rather it made it quite clear what the rules were, and should therefore be retained.

77. Mr. WALLACE (United States of America) said that it would be bad practice to retain article 34 (9) (d), because its meaning could be queried.

78. The CHAIRMAN said that, if there were no strong objections, he would take it that the Commission agreed to delete article 34 (9) (d).

79. It was so decided.

80. The text proposed by the drafting group for article 6 (1) and (2) was adopted.

Article 6 (3)

81. Ms. ZIMMERMAN (Canada) said that a further amendment to the text as it appeared in document A/CN.9/371 was needed in order to ensure that the provision applied to other documents used in soliciting offers or proposals as well as prequalification and solicitation documents.

82. Mr. SAHAYDACHNY (Secretariat) thought that that concern might be met if the text were amended to read: "... prequalification documents, if any, the solicitation documents or any other documents used to solicit offers or proposals and shall apply equally ...".

83. Ms. ZIMMERMAN (Canada) suggested that the paragraph might also be worded along the lines of article 22 (3) (a) as just adopted.

84. Mr. JAMES (United Kingdom) said that the same amendment would need to be made in article 6 (4).

85. It was agreed that the drafting group would decide on the most appropriate wording.

86. On that understanding, article 6 (3) was adopted.

Article 11 (1) (i)

87. The Commission agreed to the deletion of the subparagraph.

Article 11 bis

88. The proposed text was adopted.

Article 13 (2)

89. The proposed change was adopted.

Article 13 bis

90. Mr. JAMES (United Kingdom) said he thought that the end of subparagraph (a) should read as follows: "suppliers or contractors; or".

91. Mr. WALLACE (United States of America), supported by Mr. LEVY (Canada), said that it had been his delegation's impression that the word "significantly" was to be inserted before "disproportionate" in subparagraph (b).

92. Mr. SAHAYDACHNY (Secretariat) said that the drafting group had considered the insertion of "significantly" and decided against it.

93. The text proposed by the drafting group was adopted.

Article 18 (3)

94. It was agreed to delete the paragraph.

Article 19 (1) (d)

95. The proposed change was adopted.

Article 25

96. The CHAIRMAN invited the Commission to take up article 25 (3), which was not dealt with in the drafting group's report.

97. Mr. SAHAYDACHNY (Secretariat) reminded the Commission that it had decided to refer, in subparagraph (3), to "the absolute discretion" of the procuring entity, a matter which had been unintentionally passed over by the drafting group. Article 25 (3) should begin with the following wording: "The procuring entity may, in its absolute discretion".

98. It was so decided.

99. Mr. PRIESTLEY (Observer for Australia), referring to article 25 (1), recalled that his delegation had suggested the inclusion of a reference to the location for the submission of tenders in that paragraph. The Canadian delegation had produced a proposed wording which had been adopted by the Commission.

100. Mr. LEVY (Canada) said that his delegation had proposed the following wording: "The procuring entity shall fix a specific date and time as the deadline for and the location for the submission of tenders".

101. Mr. SAHAYDACHNY (Secretariat) suggested the following wording for the end of the sentence: "deadline for, and the place for, the submission of tenders".

102. Mr. WALLACE (United States of America) thought it would be better to mention the place before the date and time.

103. The CHAIRMAN took it that it was agreed that the wording of article 25 (1) would be changed along those lines.

104. It was so agreed.

105. The text proposed by the drafting group for article 25 (5) was adopted.

Article 26 (1)

106. The proposed change was adopted.

Article 26 (2) (b)

107. The proposed change was adopted.

Article 26 (3)

108. The proposed change was adopted.

Article 27 (1) (b)

109. The proposed text was adopted.

Article 27 (1) (c)

110. The proposed change was adopted.

Article 27 (1) (d)

111. The proposed change was adopted.

Article 27 (1) (e)

112. The proposed changes were adopted.

Article 27 (1) (f) (i)

113. The proposed change was adopted.

Article 27 (2)

114. The proposed change was adopted.

Article 27 (2) (b)

115. The proposed change was adopted.

Article 27 (2) (d)

116. Mr. JAMES (United Kingdom) said he thought that the word "such" should be added before the words "withdrawal is permitted".

117. The proposed new text was adopted.

Article 29 (1) (b)

118. The proposed text was adopted.

Article 29 (4) (d)

119. The proposed change was adopted.

Article 29 (5)

120. Ms. CRISTEA (Observer for Romania) said she thought it had been proposed that the text should read: "For the purposes of comparing and evaluating tenders, the tender prices of all tenders shall be converted to the same currency".

121. Mr. OLIVENCIA RUIZ (Spain) said that the wording had been discussed by the drafting group, which had preferred the form of words indicated.

122. The change proposed by the drafting group was adopted.

Article 29 (6)

123. Mr. WALLACE (United States of America) wondered whether the proposed change had any implications for other articles.

124. Mr. SAHAYDACHNY (Secretariat) noted that the wording "to demonstrate again" had already been adopted in article 7 (8).

125. The changes proposed in article 29 (6) were adopted.

Article 29 (7)

126. The proposed change was adopted.

Article 31

127. The proposed change was adopted.

Article 32 (3)

128. The proposed change was adopted.

Article 32 (6)

129. The proposed change was adopted.

Article 32 bis

130. The proposed text was adopted.

Article 34

131. The proposed changes were adopted.

Article 35 (4)

132. The proposed change was adopted.

Article 36 (3)

133. The proposed text was adopted.

Article 38 (2) (c)

134. It was agreed to delete the subparagraph.

Article 38 (2) (d)

135. The proposed change was adopted.

Article 38 (2) (e)

136. Mr. JAMES (United Kingdom) said that the text of the proposed new subparagraph (f) should read "an omission referred to in article 21 (s)".

137. The proposed additional text was adopted.

Document A/CN.9/XXVI/CRP.4/Add.3

138. Mr. WALLACE (United States of America) wondered whether the provisions of article 6 also covered prequalification. If the procuring entity had excluded a tenderer at the prequalification stage on the basis of what it deemed to be a material inaccuracy or incompleteness, which was not promptly remedied, would the tenderer have recourse at the subsequent document solicitation stage?

139. Mr. JAMES (United Kingdom) said he thought there was no real difficulty. Article 6, paragraph (6), applied to all qualifications, including prequalifications. The effect of the new subparagraph (c) was that, in prequalification proceedings, a prospective supplier or contractor could not be eliminated for providing information which was incomplete or inaccurate in a non-material sense, provided it remedied the deficiencies promptly upon request. If a procuring entity examining the response to its invitation to prequalify found that the qualifications of one of its potential suppliers were deficient in a material sense, it could disqualify such a supplier under article 6, paragraph (6) (b). However, if the information was incomplete in a non-material sense, the procuring entity could not disqualify the supplier if the latter remedied the deficiency promptly. The procuring entity must therefore ask the supplier, at the relevant time, to provide the missing information. If it failed to do so, article 6, paragraph (6) (c), would not apply, so there was no likelihood of a supplier claiming, two years later, that the information given had been complete in all but non-material respects. Theoretically, a problem could arise if the procuring entity failed to identify the deficiency at the relevant time; but in that case it could ask the supplier to requalify.

140. Mr. GRIFFITH (Observer for Australia) said that, if the information was incomplete in a non-material respect, nobody would take the trouble to remedy it. As drafted, article 6, paragraph (6) (c), failed to cover the situation where there was no request by the procuring entity to remedy the deficiency. In that event, there was no means of disqualifying the supplier. However, there was no need for the text to deal exhaustively with non-material inaccuracies, and the provision could perhaps be deleted.

141. Mr. SAHAYDACHNY (Secretariat) said that the intention in article 6, paragraph (6) (c), was to establish the rule that a procuring entity could not disqualify a supplier or contractor for non-material defects in the information presented for qualification, subject to the obligation on the part of the supplier or contractor to correct such defects if requested to do so. For the sake of clarity, he suggested replacing the words "provided that" by "unless" and the word "remedies" by "fails to remedy".

142. Mr. GRIFFITH (Observer for Australia) said that the new text appeared to be dealing with two issues at once: the obligation on the supplier or contractor to remedy defects on request, and the prohibition against disqualification for non-material deficiencies. Those points should perhaps be expressed in separate sentences. He suggested starting a new sentence after "non-material respect", to read "The supplier or contractor shall remedy such deficiencies promptly upon request by the procuring entity".

143. Mr. LEVY (Canada) said that there would be a problem of interpretation in the event that the supplier or contractor failed to remedy the deficiencies. Apparently, it would not be disqualified for failure to do so. He suggested replacing the words "provided that" by "if", keeping the two sentences together.

144. Ms. CRISTEA (Observer for Romania) suggested the formula: "... in a non-material respect, in which case the supplier or contractor is obliged to remedy such deficiencies promptly upon request by the procuring entity".

145. Mr. WALLACE (United States of America) said that the paragraph should then continue: "and shall be disqualified if it fails to do so".

146. Mr. GRIFFITH (Observer for Australia) said that the two rules contained in the subparagraph must be kept separate. Even if there was no request from the procuring entity, an issue of disqualification might still arise.

147. Mr. JAMES (United Kingdom) agreed that the draft was silent on the consequences of failure by a supplier or contractor to comply with a request by the procuring entity to supply deficient information. However, the Commission appeared to feel that even in the case of non-material deficiencies, the procuring entity should be able to disqualify a supplier or contractor that failed to remedy the deficiency promptly upon request. That could be achieved by starting a new sentence after "non-material respect" reading "A supplier or contractor shall be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity".

148. Mr. GRIFFITH (Observer for Australia) suggested replacing "shall" by "may". The disqualification should be at the discretion of the procuring entity.

149. The CHAIRMAN said he took it that the Commission wished to adopt the amendment suggested by the United Kingdom delegation with the change suggested by the Australian delegation.

150. It was so decided.

151. The changes proposed by the drafting group in document A/CN.9/XXVI/CRP.4/Add.3, as amended, were adopted.

152. Ms. ZIMMERMAN (Canada) expressed appreciation on behalf of the Commission for the efforts of the drafting group.

Arrangements for publication of the Model Law and Guide to Enactment

153. Mr. KOMAROV (Russian Federation) noted that the Commission had not yet decided how to link the text of the Model Law with the text of the Guide.

154. The CHAIRMAN said the Commission needed to decide whether the Model Law should be published in combination with the Guide, or separately, and how the texts should be presented.

155. Mr. MORAN BOVIO (Spain) asked the Secretariat for some guidance on the matter.

156. Mr. HERRMANN (Secretary of the Commission) said that the full text of the Model Law would be submitted to the Commission at the end of its session as an annex to the draft report. The revised draft Guide would be issued later as an ordinary document.

157. Mr. GRIFFITH (Observer for Australia) said that the text of the Model Law could usefully be prefaced by parts of the Guide as prepared by the

(Mr. Griffith, Observer for Australia)

Secretariat, for instance paragraphs 1 to 4 and 9 to 20, explaining the history and purpose of the Model Law. The Guide should, however, appear as a separate publication.

158. Ms. DODSWORTH (United Kingdom) said her delegation would be happy for the Model Law and the Guide to appear as two separate United Nations documents, according to standard practice.

159. Mr. SOLIMAN (Egypt) suggested annexing the Guide to the text of the Model Law.

160. Mr. MORAN BOVIO (Spain), supported by Mr. GRUSSMANN (Austria), thought the question whether and how to combine the two texts could be left to the Secretariat.

161. Mr. KOMAROV (Russian Federation) said that users of the Model Law would expect to have recourse to the Guide. The question was, therefore, how the Guide could be made readily available.

162. Mr. HERRMANN (Secretary of the Commission) said the Secretariat would add to the cover page of the Model Law a footnote referring to the existence of the Guide. He pointed out that, owing to the severe financial constraints under which the United Nations was currently operating, there were no funds available for special publications, unless Governments wished to contribute for that purpose.

163. Mr. KOUVSHINOV (Russian Federation) said that the Guide did not contain specific interpretations of each article of the Model Law. It could therefore be issued separately.

164. Mr. WALLACE (United States of America) suggested that the Guide be issued in a simple, stapled form. He agreed, however, that the form of publication of the Model Law and the Guide was a matter for the Secretariat to decide.

165. The CHAIRMAN said he thought it was the Commission's wish that the Model Law and the Guide should be issued as United Nations documents, with appropriate cross-references.

166. Mr. SAHAYDACHNY (Secretariat) suggested that the Commission might wish to adopt the Model Law by means of a formal resolution. The Secretariat could draft a resolution for consideration by the Commission later in the session.

167. It was so agreed.

The meeting rose at 5.05 p.m.